

# COPY

RECORDING REQUESTED BY:  
10th Street Land Management Corp.  
6438 Berwickshire Way  
San Jose, California 95120

CONFIRMED COPY: This document has  
not been compared with the original.  
SANTA CLARA COUNTY CLERK-RECORDER

WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control  
Berkeley Office  
700 Mainz Avenue, Suite 200  
Berkeley, California 94710  
Attention: Barbara J. Cook, P.E., Chief  
Northern California-Coastal Cleanup  
Operations Branch

Doc#: 16142842  
3/06/2002 1:39 PM

---

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE

## COVENANT TO RESTRICT USE OF PROPERTY

### ENVIRONMENTAL RESTRICTION

(Re: Assessor's Parcel No. 477-09-037  
Lorentz Barrel and Drum Superfund Site)

---

This Covenant and Agreement ("Covenant") is made by and between 10th Street Land Management (the "Covenantor"), the current owner of property situated in San Jose, County of Santa Clara, State of California, described in Exhibit "A", attached hereto and incorporated herein by this reference (the "Property"), and the Department of Toxic Substances Control (the "Department"). Pursuant to Civil Code section 1471(c), the Department has determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials as defined in Health and Safety Code ("H&SC") section 25260. The Covenantor and the Department, collectively referred to as the "Parties", hereby agree that the use of the Property be restricted as set forth in this Covenant. The Parties further intend that the provisions of this Covenant also be for the benefit of the U.S. Environmental Protection Agency as a third party beneficiary.

ARTICLE I  
STATEMENT OF FACTS

1.01. The Property, totaling approximately 5 acres is more particularly described and depicted in Exhibit "A", attached hereto and incorporated herein by this reference. The Property is located at 1507 South 10th Street, at the corner of South 10th Street and Alma Avenue, San Jose, County of Santa Clara, State of California. This property is more specifically described as Santa Clara County Assessor's Parcel No. 477-09-037.

1.02. The Property commonly known as Lorentz Barrel and Drum Site was operated as a drum recycling facility from 1947-1987. Autowrecking facilities, a junkyard, a roofing company, a construction company and a sandblasting company also operated on the Property. Contamination was first identified in 1981. In late 1987 and 1988, the United States Environmental Protection Agency ("U.S. EPA") and the Department jointly conducted emergency response actions to remove contaminated soils.

Several remediation technologies have been employed to address the contamination on the Property, including without limitation, a groundwater pump and treat system, soil vapor extraction ("SVE") system, encapsulation of contaminated soil with a asphalt-concrete cap to prevent infiltration to groundwater, and removal and off-site disposal of contaminated soil, septic system and sewer lines. The Site was divided into two operable units (OU). OU 2 consisted of evaluation and remediation of the shallow groundwater. The Record of Decision for OU 2 was signed in September 1988 by U.S. EPA, and the remedy selected consisted of extraction of contaminated shallow groundwater and treatment. Currently, a group of potentially responsible parties, under a consent decree (C-90-0488) entered into in 1990, operates a pump and treatment system to remediate contaminated groundwater. The Record of Decision for Operable Unit 1 was signed in August 1993 by U.S. EPA and addresses a final action for the contaminated soil and debris. The selected remedy includes treating contaminated soil using SVE, capping the remaining contaminated soil and debris with asphaltic concrete pavement, groundwater monitoring, removal and disposal of other contaminated materials, debris and stockpiled soils, and implementing institutional controls. U.S. EPA operates a SVE system at the Property. The location of SVE system and groundwater treatment system are shown on Exhibit B.

The asphalt-concrete cap is continuous over the entire parcel. Reinforced, cast-in-place concrete retaining walls and cast-in-place concrete curbs and gutters are at the Site perimeter. An eight-foot high metal mesh fence with heavy gauge posts is continuous around the Site perimeter and two locked access gates (one on Alma Street and one on 10th Street) have been installed.

All surface water is collected within the Site perimeter and is collected in a large storm drain inlet near Alma Street. The storm water is then sent to the main City of San Jose storm drain located under Alma Street.

1.03. The primary contaminants of concern affecting groundwater are: arsenic, nickel, trichloroethane, 1,1-dichloroethane, 1,1-dichloroethene, 1,2-dichloropropane, cis-1,2-dichloroethene, 1,2-dichloroethane, 1,1,2,2-tetrachloroethane, benzene, chloroform, tetrachloroethene, trichloroethene, toluene, chlordane, toxaphene, PCBs (total) and vinyl chloride. Contaminants of concern identified in soil include: arsenic, chromium, lead, aldrin, chlordane, 4,4-DDD, 4,4-DDE, 4,4-DDT, dieldrin, endosulfan, PCBs (total), 2,3,7,8-TCDD, phenol, di(ethylhexyl)phthalate, bis(2-ethylhexyl)phthalate, di-n-butylphthalate, butylbenzylphthalate, phenanthrene, pentachlorophenol (PCP), trichloroethene, and tetrachloroethene. The potential human health effects resulting from exposure to these contaminants are as described in the US Department of Health and Human Services, Public Health Services, Agency for Toxic Substances and Disease Registry, Individual Toxicological Profiles. Based on the health risk assessment prepared by Ebasco in July 1990, the Department concluded that use of the Property as residence, hospital, school or day care center would entail an unacceptable cancer risk. The Department further concluded that the Property, as remediated, and subject to the restrictions of the Covenant, does not present an unacceptable threat to human safety or environment, if limited to commercial and industrial use.

## ARTICLE II DEFINITIONS

2.01. Department. "Department" means the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02. U.S. EPA. "U.S. EPA" means the United States Environmental Protection Agency and includes its successor agencies, if any.

2.03. Owner. "Owner" means the Covenantor, its successors in interest, and their successors in interest, including heirs and assigns, who at any time hold title to, or an ownership interest in, all or any portion of the Property.

2.04. Occupant. "Occupant" means Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.05. CERCLA Lead Agency. "CERCLA Lead Agency" means the governmental entity having the designated lead responsibility to implement response action under the National Contingency Plan ("NCP"), 40 C.F.R. Part 300. U.S. EPA is the CERCLA Lead Agency at the time of the recording of this instrument.

ARTICLE III  
GENERAL PROVISIONS

3.01. Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions"), subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: (a) runs with the land pursuant to H&SC section 25355.5(a)(1)(C) and Civil Code section 1471; (b) inures to the benefit of and passes with each and every portion of the Property, (c) is for the benefit of, and is enforceable by the Department, (d) is for the benefit of U.S. EPA as a third party beneficiary, and (e) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof.

3.02. Binding upon Owners/Occupants. Pursuant to H&SC section 25355.5(a)(1)(C), this Covenant binds all owners of the Property, their heirs, successors, and assignees, and the agents, employees, and lessees of the owners, heirs, successors, and assignees. Pursuant to Civil Code section 1471(b), all successive owners of the Property are expressly bound hereby for the benefit of the Department and U.S. EPA.

3.03. Written Notice of the Presence of Hazardous Substances. Prior to the sale, lease, sublease, assignment or other transfer of the Property, or any portion thereof, the owner, lessor, sublessor, assignor or other transferor shall give the buyer, lessee, sublessee, assignee or other transferor written notice that hazardous substances are located on or beneath the Property, as required by H&SC section 25359.7.

3.04. Incorporation into Deeds and Leases. The Restrictions set forth herein shall be incorporated by reference in each and all deeds, leases, assignments, or other transfers of all or any portion of the Property which are hereafter executed or renewed. Further, each Owner or Occupant shall include in any instrument conveying any interest in all or any portion of the Property, including but not limited to deeds, leases, and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL RESTRICTION AND COVENANT TO RESTRICT USE OF PROPERTY, RECORDED IN THE PUBLIC LAND RECORDS ON [DATE]\_\_\_\_, IN BOOK \_\_\_\_\_, PAGE \_\_\_\_\_, IN FAVOR OF AND ENFORCEABLE BY THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL, AND FOR THE BENEFIT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

3.05. Conveyance of Property. The Owner shall provide notice to the Department and to U.S. EPA not later than thirty (30) days after any conveyance of any ownership interest in the Property (excluding mortgages, liens, and other non-possessory encumbrances). The Department and U.S. EPA shall not, by reason of this Covenant,

have authority to approve, disapprove, or otherwise affect proposed conveyance, except as otherwise provided by law, by administrative order, or by a specific provision of this Covenant.

ARTICLE IV  
RESTRICTIONS

4.01. Prohibited Uses. The Property shall not be used for any of the following purposes:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation.
- (b) A hospital for humans.
- (c) A public or private school for persons under 21 years of age.
- (d) A day care center for children.
- (e) A Public Park.

4.02. Soil Management

- (a) Except as provided by Section 4.02(b) below, the Property shall not be used in such a way that will disturb or interfere with the integrity of the Cap, the SVE system, or the groundwater treatment system as noted in Section 4.04.
- (b) The Property shall be used and developed in a way that preserves the integrity of the Cap installed on the Property, except that under the supervision of the CERCLA Lead Agency, the Cap may be removed or disturbed temporarily to install fixtures, repair or replace the Cap or install improvements on the Property. The capped soil shall not be disturbed without a Soil Management Plan and a Health and Safety Plan submitted to the CERCLA Lead Agency for review and approval.
- (c) Any contaminated soils brought to the surface by grading, excavation, trenching or backfilling shall be managed in accordance with all applicable provisions of state and federal law.
- (d) The Owner shall provide the CERCLA Lead Agency written notice at least fourteen (14) days prior to any activities which will disturb the Cap, underlying soils, or soil and groundwater treatment systems.

4.03. Prohibited Activities. The following activities shall not be conducted at the Property:

- (a) Raising of food (cattle, food crops), and
- (b) Extraction of groundwater for purposes other than site remediation

4.04. Non-Interference with Cap, SVE System or Groundwater Treatment System. Covenantor agrees:

- (a) Activities that may disturb the Cap (e.g. excavation, grading, removal, trenching, filling, earth movement, or mining) shall not be permitted on the Capped Property without prior review and approval by the CERCLA Lead Agency.
- (b) All uses and development of the Capped Property shall preserve the integrity and physical accessibility of the Cap, SVE System and Groundwater Treatment System.
- (c) The Cap shall not be altered without written approval by the CERCLA Lead Agency.
- (d) Covenantor shall notify the CERCLA Lead Agency of each of the following: (i) the type, cause, location and date of any damage to the Cap and (ii) the type and date of repair of such damage. Notification to the CERCLA Lead Agency shall be made as provided below within ten (10) working days of both the discovery of any such disturbance and the completion of any repairs. Timely and accurate notification by any Owner or Occupant shall satisfy this requirement on behalf of all other Owners and Occupants.

4.05. Access for the Department. The Department shall have reasonable right of entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health or safety, or the environment. Nothing in this instrument shall limit or otherwise affect U.S. EPA's right of entry and access, or U.S. EPA's authority to take response actions under CERCLA, the National Contingency Plan, 40 C.F.R. Part 300, and its successor provisions, or federal law.

4.06. Access for Implementing Operation and Maintenance. The entity or person responsible for implementing the Operation and Maintenance Plan shall have reasonable right of entry and access to the Property for the purpose of implementing the Operation and Maintenance Plan until the CERCLA Lead Agency determines that no further Operation and Maintenance is required.

ARTICLE V  
ENFORCEMENT

5.01. Enforcement. The Department shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. This Covenant shall be enforceable by the Department pursuant to Health and Safety Code, Division 20, Chapter 6.5, Article 8 (commencing with section 25180). Failure of the Covenantor, Owner or Occupant to comply with any of the Restrictions specifically applicable to it shall be grounds for the Department to require that the Covenantor, Owner, or Occupant modify

or remove any improvements ("Improvements" herein shall mean all buildings, roads, driveways, and paved parking areas) constructed or placed upon any portion of the Property in violation of the Restrictions. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA, and violation of this Covenant shall be grounds for the Department to file civil or criminal actions as provided by law or equity.

#### ARTICLE VI VARIANCE, TERMINATION, AND TERM

6.01. Variance. Covenantor, or any other aggrieved person, may apply to the Department for a written variance from the provisions of this Covenant. Such application shall be made in accordance with H&SC section 25233. Unless and until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no variance may be granted under this paragraph 6.01 without prior review and prior concurrence of the variance by U.S. EPA. If requested by the Department or U.S. EPA, any approved variance shall be recorded in the land records by the person or entity granted the variance.

6.02 Termination. Covenantor, or any other aggrieved person, may apply to the Department for a termination of the Restrictions or other terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with H&SC section 25234. Unless and until the State of California assumes CERCLA Lead Agency responsibility for Site operation and maintenance, no termination may be granted under this Paragraph 6.02 without prior review and prior written concurrence of the termination by U.S. EPA.

6.03 Term. Unless ended in accordance with the Termination paragraph above, by law, or by the Department in the exercise of its discretion, after review and prior written concurrence by U.S. EPA, this Covenant shall continue in effect in perpetuity.

#### ARTICLE VII MISCELLANEOUS

7.01. No Dedication or Taking. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication, of the Property, or any portion thereof to the general public or anyone else for any purpose whatsoever. Further, nothing set forth in this Covenant shall be construed to effect a taking under state or federal law.

7.02. Department References. All references to the Department include successor agencies/departments or other successor entity.

7.03. Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of Santa Clara within ten (10) days of the Covenantor's receipt of a fully executed original.

7.04. Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served, or (2) three (3) business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To Owner: 10th Street Land Management  
c/o Jerry Daniels  
6438 Parwickshire Way  
San Jose, California 95120

To Department: Barbara J. Cook, P.E., Chief  
Department of Toxic Substances Control  
Northern California - Coastal Cleanup  
Operations Branch  
700 Heinz Avenue, Suite 200  
Berkeley, California 94710

To EPA: U.S. EPA, Region IX  
Re: Lorentz Barrel & Drum Superfund Site  
CERCLIS: CAD029295706  
Attn: Diane Strassmaier  
75 Hawthorne Street, SFD-7-4  
San Francisco, California 94105-3901

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

7.05. Partial Invalidity. If any portion of the Restrictions or other terms set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant, or the application of such portions to persons or circumstances other than those to which it is found to be invalid, shall remain in full force and effect as if such portion found invalid had not been included herein.

7.06. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed to effect the purpose of this instrument and the policy and purpose of CERCIA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

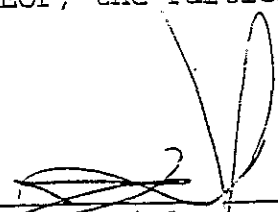
7.07 Third Party Beneficiary. U.S. EPA's rights as a third party beneficiary of this Covenant shall be construed pursuant to principles of contract law under the statutory and common law of the State of California.



7.08 Statutory References. All statutory references include successor provisions.

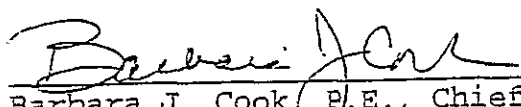
IN WITNESS WHEREOF, the Parties execute this Covenant.

Covenantor.

By:   
Title: Jerry Daniels, President  
10th Street Land Management

Date: 2/8/2002

Department of Toxic Substances Control

By:   
Title: Barbara J. Cook, P.E., Chief  
Northern California - Coastal Cleanup  
Operations Branch

Date: 2/14/2002

EXHIBIT A

(Legal Description)

All that certain real property situated in the City of San Jose, County of Santa Clara, State of California, described as follows:

Parcel 1, as shown on that Parcel Map filed for record in the office of the Recorder of the County of Santa Clara, State of California on March 10, 1981, in Book 480 of Maps, page(s) 41.

EXCEPTING the Northwest 30 feet of the most Southwest 212.60 feet conveyed to Arata Western, Inc., a California corporation by Deed recorded in Book H 014, Official Records, Page 733, and as described in Lot Line Adjustment, recorded in Book G 628, Official Records, Page 364.

Alameda  
STATE OF CALIFORNIA

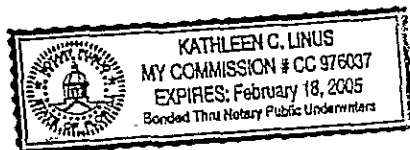
COUNTY OF Humboldt

On this 8 day of February, in the year  
2002, before me Kathleen C. Linus,  
personally appeared Gerry Daniels,

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is /are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Kathleen C. Linus



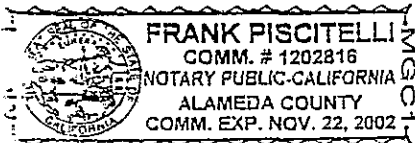
ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of ALAMEDA } ss.

On 2/14/02 before me, FRANK PISCITELLI,  
(DATE) (NOTARY)  
personally appeared BARBARA JEAN COOK  
SIGNER(S)

☐ personally known to me - OR - ☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Frank Piscitelli  
NOTARY'S SIGNATURE

OPTIONAL INFORMATION

The information below is not required by law. However, it could prevent fraudulent attachment of this acknowledgment to an unauthorized document.

CAPACITY CLAIMED BY SIGNER (PRINCIPAL)

☒ INDIVIDUAL  
☐ CORPORATE OFFICER

TITLE(S)

☐ PARTNER(S)  
☐ ATTORNEY-IN-FACT  
☐ TRUSTEE(S)  
☐ GUARDIAN/CONSERVATOR  
☐ OTHER: \_\_\_\_\_

DESCRIPTION OF ATTACHED DOCUMENT

Covenant to Restrict Use  
TITLE OR TYPE OF DOCUMENT

Number 3  
NUMBER OF PAGES

DATE OF DOCUMENT

SIGNER IS REPRESENTING:  
NAME OF PERSON(S) OR ENTITY(IES)

OTHER